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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,
v.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Respondent.
No. 655.

RESPONDENT'S SUPPLEMENTAL BRIEF

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STATEMENT OF CASE

The Facts

The preliminary statement on page 2 of petitioners' brief is correct. Petitioners' statement of the facts, however, (pp. 3-4, their brief) contains certain legal conclusions and omits certain facts.

Respondent owns and operates an enameling factory at Frankfort, Indiana, in which are installed various machines,

ovens, tools and equipment. It manufactures enamel, a vitreous substance composed of fluorspar, cobalt oxide, soda ash, etc., both in a granular form known in the industry as frit, and in a hard, finished form attached to metal articles. In the transactions involved herein the enamel was in the latter form, attached to metal parts used in stoves and refrigerators manufactured by respondent's customers located in Ohio, Michigan, Wisconsin and Illinois. Respondent's traveling salesmen originally solicited and negotiated in said states written purchase orders from such customers, which ordinarily set forth the quantities, specifications and prices of the various items of enameling, and other terms of purchase. The purchase orders forming the basis of the receipts from the transactions involved herein were so obtained or were repeat orders which the customers placed with respondent. After respondent accepted such purchase orders, respondent drove its trucks to the factories of such customers in other states, where the stove and refrigerator parts, of plain unenameled metal, were placed in said trucks and hauled to respondent's plant. After respondent attached hard, finished enamel to such parts respondent hauled them in its trucks back across state lines to the respective plants of such customers for assembly into stoves or refrigerators. Respondent also had its enameling superintendent and other officials call on the customers at said factories from time to time in connection with the customers' enameling problems, carried on extensive communication with its customers by mail, telephone and telegraph in connection with its business with such customers, and received by mail payments of the prices set forth in the purchase orders. The value of the metal parts as a unit, after respondent had attached enamel thereto, was from 2¼ to 3 times the value of the parts theretofore. (R. 20-22.)

The Issue

Petitioners' statements of the issues (pp. 5 and 9 of their brief) are inaccurate. The issue is whether, because of the commerce clause of the Constitution, respondent's aforesaid receipts were not subject to the Indiana Gross Income Tax Act (Chapter 117 of the Indiana Acts of 1937, Sec. 64-2601 et seq. Burns' Ind. Stat. 1933, Pocket Supp. 1940). Said Act was before this court in *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307. Amendments adopted in 1937 are not involved.

Summary of Argument

A. Respondent's receipts were from interstate sales of goods because (1) each purchase order, upon acceptance by respondent, constituted a contract for the sale of goods, even though respondent was a bailee of the metal parts; (2) even if each purchase order accepted by respondent be deemed a contract for labor and materials, nevertheless a sale resulted from respondent's delivering to its customers the hard, finished enamel attached to such parts; and (3) even disregarding the purchase orders, respondent's receipts were from sales of goods because respondent furnished the principal material. Such receipts were therefore non-taxable.

B. Such receipts, even if from services, were from interstate commerce. As applied thereto, the tax violates the commerce clause of the Constitution.

ARGUMENT

Petitioners in effect complain of the lower courts' determination of a fact. They urge that such courts erroneously decided that respondent's gross receipts were from activities in interstate commerce, and argue that such receipts were "derived as payment for the services it rendered wholly within Indiana" (p. 9, their brief). Petitioners tacitly concede that receipts derived from activities in interstate commerce are not subject to the tax.

It is respondent's position that (A) the gross receipts were from interstate sales of goods, and (B) even if said receipts were from services, they were from interstate commerce. As applied to such receipts, the tax violates the commerce clause.

A

The Receipts Were From Sales of Goods

1. The accepted purchase orders constituted contracts from which respondent's gross receipts involved herein arose. Although no definition of a sale appears in the Indiana Gross Income Tax Act, a sale of goods is defined in the Uniform Sales Act, in force in Indiana, as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price," (Section 58-101 (2) Burns' Ind. Stats. 1933), a contract to sell goods is defined as "a contract whereby the seller agrees to transfer the property in goods for a consideration called the price," (Section 58-101 (1) Burns' Ind. Stats. 1933) and goods are defined in said act as including "all chattels personal other than things in action and money." (Section 58-606 (1) Burns' Ind. Stats. 1933.) The Uniform

Sales Act was in force in each of the aforesaid states at all times in question. (Sec. 8381 et seq. Throckmorton's 1940 Annotated Code of Ohio; Sec. 9444 et seq. Michigan Compiled Laws of 1929; Sec. 121.01 et seq. Wisconsin Statutes 1939; Chap. 121a Illinois Revised Statutes, 1939.)

In the light of such definitions it is clear that respondent sold the hard, finished enamel to its customers.

Apart from the Uniform Sales Act, each accepted purchase order constituted a contract of sale of goods. There is a valid sale at common law if the following elements are present in the transaction: (1) competent parties, (2) a subject matter or thing sold, (3) price or consideration, and (4) mutual assent or agreement of the parties. See *Cannelton v. Collins*, 172 Ind. 193, 195.

In the case at bar each such element clearly was present. The only element concerning which there can be any possible question is the second, relating to a subject matter. Respondent maintains that the subject matter was enamel manufactured by respondent in its hard, finished form, attached to the metal parts furnished by respondent's customers.

In *National Enameling and Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, a patent case, the court recognized the various forms of enamel and summarized the manufacturing process as follows (page 20):

> "The art of enameling metal is old. Many different formulas and substances are used to form the enamel, but the usual process is substantially as follows: Certain ingredients, usually a mixture of silica or sand, and of other substances having a fluxing property to produce glass when mixed with sand and subjected to heat, are mixed together

> mechanically. This mixture is called by enamelers the 'mix'. The mix is then subjected to a high degree of heat and fused, resulting in a vitrified or glassy mass. This is called the 'frit'. The frit is then put in a mill and ground fine, with a mixture of clay and water, resulting in a liquid paste. This is called the 'dip'. The metal article to be enameled is then dipped in the paste, dried, and subjected to a very high temperature in an oven or muffle. In some cases more than one dipping and burning takes place. The result is, if the operation is successful, a metal article with its surface covered with an adherent coat of metal."

The "adherent coat of metal" which the court mentioned certainly constituted goods. In the National Enameling case the court (page 23) referred to "the burned enamel on the completed article" as a form of enamel to which certain of the claims of the plaintiff therein in question related. In the concurring opinion it was pointed out (page 29) that in the specification the term "enamel" was "applied to the coating in all stages of its manufacture, to the mix, to the molten and ground or pasty mass when ready to be applied as a coating, and to the coating after it had been applied to the metal."

Petitioners have heretofore asserted that the only property furnished by respondent was the granular frit. This is a fundamental error. Respondent's customers gave purchase orders for, and were furnished by respondent, not enamel in the granular form of frit but enamel in the hard, finished form—an adherent coat of metal.

In *W. J. Holliday & Co. v. Highland Iron and Steel Co.*, 43 Ind. App. 342, 347, an accepted purchase order for the furnishing of certain bar iron, setting forth various terms of purchase, was held to constitute a contract for

the purchase and sale of goods, and in *National Hame & Chain Co. v. Robertson,* 90 Ind. App. 556, an accepted purchase order for soft metal bands was recognized by the court as constituting such a contract. The mere fact that the subject matter of the accepted purchase orders in the case at bar was hard, finished enamel instead of bar iron or soft metal bands makes such purchase orders no less contracts for the purchase and sale of goods.

In *Western Leather & Finding Co. v. State Tax Commission,* 87 Utah 227, 48 P. (2d) 526, was involved the question whether delivery of repaired shoes to the owner and receipt of payment therefor constituted a sale of materials used in the repair, under a Utah law imposing a tax upon every retail sale of tangible personal property. Said the court:

> "If the charge made for repairing shoes constitutes a sale by the shoe repairer to the owner of the shoes of the materials used in the repair jobs, then and in such case under the express provisions of the act the plaintiff is not liable for the payment of the tax here sought to be imposed upon it. • • • The mere fact that the leather and other materials here in question were used to make only a part of a shoe does not change the nature of the transaction. A 'sale of goods' is defined as 'an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.' R. S. Utah 1933, 81-1-1. • • • When a shoe repairer delivers the repaired shoes to the owner thereof and receives payment therefor, the title to the materials used in the repair job passes to the owner. The amount paid includes the price of the materials used. Such a transaction possesses all the elements of a sale of the materials used in the repair job." 48 P. (2d) 528.

It will be observed that the foregoing definition of "sale of goods" is that given in the Uniform Sales Act. The court further held wholly immaterial the fact that the shoe repairers did not make separate charges for services rendered and for materials furnished in repairing the shoes. Respondent, in the case at bar, was not required to, and did not, make separate charges for the frit and for the labor necessary to manufacture the hard, finished enamel from the frit. If respondent had sold frit, it would not have made separate charges for the fluorspar, cobalt oxide, soda ash and other raw materials and for the labor required to manufacture the frit, and there was no reason to do so with respect to the manufacture of the final form furnished to the customers.

That the amount of labor, skill and experience required to make tangible personal property is unimportant in determining whether a sale of such property results upon delivery thereof to the person ordering it is borne out in various cases. Thus, in *Cusick v. Commonwealth*, 260 Ky. 204, 84 S. W. (2d) 14, it was held that the furnishing of photographs constituted a sale of tangible personal property at retail. Said the court:

> "Coming to the argument that a photographer is engaged in selling service . . . . it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced, rather than the cost of materials out of which they are made. . . . . One who desires a photograph of himself or his family does not contract simply for service. He desires the finished article, and that is what he buys and what the photographer sells. It is true that the photograph is of a particular person, and that the market is limited, but that is more or less true

> in every case where clothing or other articles are made to order for a particular person, or a particular purpose, and are not regularly kept on hand." 84 S. W. (2d) 15.

In *People ex rel. Walker Engraving Corp. v. Graves*, 243 App. Div. 652, 276 N. Y. S. 674, a manufacturer of photo engraving delivered the finished product to the person ordering it as a piece of copper or zinc plate with an etching or photo engraved upon it. The engraving company contended that it was paid for its services and not for the metal delivered, the value of the mere metal being quite small, but the court held that there was a sale of the article and that the proceeds were subject to the retail sales tax. The decision was affirmed on appeal. 268 N. Y. 648, 198 N. E. 539.

In *People ex rel. Foremost Studio v. Graves*, 246 App. Div. 130, 284 N. Y. S. 906, it was held that the furnishing of designs made on paper at the request of customers, used to make a tracing on copper rolls through which fabric was run in order to imprint the figures on cloth, constituted a sale of such designs under a statute imposing a tax upon the privilege of selling tangible personal property at retail. The court said:

> "Here the relator was conducting the business of putting on paper figures or designs, and offering sketches for sale, and each had an intrinsic value, albeit perhaps possessing an artistic quality of principle. . . . . The relator was a purveyor of fabric designs, and its business was not different in principle from those who furnished special thread, implements, or coloring dyes, or engraved plates, to meet the needs of industry." 284 N. Y. S. 908.

That respondent was the bailee of the plain metal parts furnished by the customers clearly did not preclude a sale of the hard, finished enamel manufactured by respondent and attached to the parts. Examples of a bailee's selling tangible personal property attached by him to other property which a customer bailor furnishes are common. If a horse is taken to a blacksmith to be shod, the blacksmith is the bailee of the horse (*Pusey v. Webb* (Del), 47 Atl. 701), but title to the shoes which the blacksmith attaches to the horse's feet passes to the owner of the horse and there is clearly a sale of the shoes. This is true even though the blacksmith makes the shoes. If a man takes his leather shoes to a shoe repairman to have new soles attached, the repairman is the bailee of the shoes. However, there is a sale of the leather which the repairman uses, upon redelivery of the shoes and payment for the repairs. (*Western Leather & Finding Co. v. State Tax Commission*, 87 Utah 227, 48 Pac. (2d) 526). If a man takes his automobile to the garage of a mechanic and leaves it for repairs, the mechanic is the bailee of the automobile (see 6 C. J. p. 1124, section 62), but if the mechanic attaches a new carburetor or a new radiator or other part, there is obviously a sale of the carburetor, radiator or other part when the mechanic redelivers the car to the owner and the owner makes payment to the mechanic. In none of these instances does the bailor customer sell anything to the bailee, and in none of them does the bailee make payment or extend credit to the customer, nor is there a charge made against the bailee, nor, when returned, is any charge made against the customer for the original property. The identity of the original property is not destroyed by the property added by the bailee and in each instance the property returned

is the identical property received from the customer. Nevertheless, there is a sale of the property furnished by the bailee in each instance. In other words, a bailee may clearly sell the property which he, the bailee, furnishes and attaches to the property of the bailor. This is true without reference to the doctrine of accession.

As respondent has shown, the hard finished enamel was a manufactured substance (*National Enameling, etc., Co. v. New England Enameling Co.*, 151 Fed. 19) and therefore goods just as the horse shoes, shoe leather, carburetor or radiator in the foregoing examples were goods. How much labor in relation to materials was necessary to manufacture these articles is wholly immaterial in determining whether they were goods and how much labor was necessary to manufacture the hard finished enamel, in relation to the value of the raw materials furnished, is likewise wholly immaterial.

2. Each purchase order was necessarily either (1) a contract of sale of personal property or (2) a contract for labor and materials. Respondent has shown that it was the former. However, even if it were the latter, performance of the contract by respondent, including delivery of the hard, finished enamel attached to such parts, and the acceptance thereof and payment therefor by the customer resulted in a sale of such enamel. The question whether a contract is for sale of goods or for labor and materials most frequently arises in determining whether the contract is one for the sale of goods within the Statute of Frauds. Contracts for labor and materials, as distinguished from contracts of sale, have never been within the Statute of Frauds. Prior to the Uniform Sales Act there were various rules in that connection, which are discussed in 27 Corpus Juris, pages 223-235. Sec. 4 (2) of

the Uniform Sales Act, Sec. 58-104 Burns Ind. Stats. 1933 adopts the so-called Massachusetts rule, which is hereinafter set forth. The question regarding the nature of a given contract, with respect to the Statute of Frauds, ordinarily arises only where the party ordering work done, and who may or may not have furnished part of the materials going into the completed article, does not accept the article, actually or constructively, upon completion thereof by the other party. It is well settled under the Massachusetts rule that upon delivery and acceptance of the completed article a sale results. Such rule was first laid down by Chief Justice Shaw in *Mixer v. Howarth,* 21 Pick. 205, 32 Am. Dec. 256. In that case the court said:

> "Where it (the contract) is an agreement with a workman, to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed in future, *it is not a sale until an actual or constructive delivery and acceptance;* and the remedy for not accepting is on the agreement." (Emphasis ours.)

Williston points out that this rule has been followed both in Massachusetts and elsewhere, either exactly or substantially, and cites a long list of cases which have followed the rule. 1 Williston on Sales (2d ed., 1924), sec. 55, note 22.

All the hard, finished enamel involved in the case at bar was accepted by respondent's customers who paid respondent the contract price. Clearly there was a sale of such enamel.

3. From the foregoing, it is plain that respondent was not required to have title to the enameled parts for respondent's transactions to constitute sales of hard, finished enamel. Respondent did have title to the enameled parts, however, even though respondent was not charged with, and did not pay or charge its customers for, the value of the castings and even though redelivery of the parts was contemplated.

In 1 R. C. L., p. 118, sec. 4, the rule is summarized as follows:

> "The rule is universally recognized . . . . . that where the materials of two or more persons are combined into one article, the property in the resulting thing is in the owner of the principal materials which go to make up its whole. Thus, if the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession."

In *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653, the court said that no test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values; and that the question of how much the property or labor of each has contributed to make the improved article what it is must always be one of first importance.

In the case at bar the value of the hard, finished enamel manufactured by respondent exceeded the value of the plain metal parts. It is true that in *Wetherbee v. Green* the disproportion was greater than here, but respondent submits that the relative value test should be applied herein.

B

The Receipts, Even If From Services, Were From Interstate Commerce; As Applied Thereto, the Tax Violates the Commerce Clause

Respondent has discussed this point in its brief (pp. 5-11) in opposition to the petition for certiorari.

Petitioners continue to stress the recitation in the stipulation and finding of facts that respondent billed its customers for "enameling", and contend that therefore respondent's receipts were derived from intrastate and not interstate commerce. This contention was correctly considered by the Circuit Court of Appeals as follows:

> "* * * * the question remains as to whether plaintiff's income received from customers in other states was of an interstate character, which made it immune from taxation. Defendants' argument is predicated upon the theory that the income was received solely from the enameling process performed in plaintiff's Indiana factory. There is some support for this basis in the court's finding of facts, but a reading of the entire findings makes it plain, we think, that the income received was for the total service rendered by the plaintiff, which included the enameling process. Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states. Also included in the service was the transportation by plaintiff of the stove and refrigerator parts from points in other states, and the return transportation of such parts by plaintiff after the completion of the enameling process. There was also included, communications by mail, telephone and telegraph between plaintiff and customers located in other states." 114 F. (2d) 891.

The word "enameling" was used by the parties in the sense of including all that was done by respondent in connection with the physical application of the enamel—solicitation and negotiation of orders, transportation by respondent's trucks of the metal parts from the customers' factories to respondent's factory, the manufacture of the hard, finished enamel attached to the metal parts, the return of the parts by respondent in its trucks to the customers' factories, communication by telephone, telegraph and correspondence and calls at the customers' factories from time to time in connection with the customers' enameling problems—and in the sense of excluding the castings.

Petitioners now suggest that they have never "consciously" (p. 7, their brief) taxed receipts from interstate transportation. Actually, the taxed receipts covered all activities of respondent in connection with the furnishing of the hard, finished enamel, including transportation by respondent's trucks. Whether petitioners' inclusion of receipts from respondent's activities outside Indiana in the measure of the tax was done consciously is immaterial. The Indiana Gross Income Tax Act does not purport to provide a method of apportionment and no apportionment was attempted here.

The judgment should be affirmed.

Respectfully submitted,

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